IN THE UTAH COURT OF APPEALS

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Roger Bryner, Petitioner and Appellant, v. Svetlana Bryner, Respondent and Appellee.	)	MEMORANDUM DECISION (Not For Official Publication) Case No. 20080510-CA F I L E D (August 6, 2009) 2009 UT App 217

Third District, Salt Lake Department, 044904183
The Honorable Denise P. Lindberg

Attorneys: Roger Bryner, Midvale, Appellant Pro Se
Thomas J. Burns, Salt Lake City, for Appellee

Before Judges Greenwood, Orme, and McHugh.

PER CURIAM:

This appeal is taken following a final judgment in the child custody proceedings involving Roger Bryner (Father) and Svetlana Bryner (Mother). Father appeals a May 8, 2006 judgment regarding cross-motions for enforcement of a settlement agreement. He does not, however, challenge the child custody determination made by the district court in the final judgment entered on May 8, 2008. Therefore, he has neither argued nor demonstrated that the district court's decision on child custody is not supported by sufficient evidence or is not in the children's best interests.

On November 10, 2005, the parties engaged in mediation and agreed to a settlement. The settlement agreement was not reduced to writing, and the recording equipment malfunctioned. The parties met again on December 8, 2005, in an effort to reconstitute the settlement agreement. After efforts to agree on all issues were unsuccessful, both Father and Mother filed cross-motions to enforce their versions of the settlement agreement. At a February 28, 2006 evidentiary hearing on the cross-motions, the parties reached a number of agreements on the record. On May 8, 2006, the district court entered its Findings of Fact, Conclusions of Law, and Judgment on Cross-Motions.

After the February 28 hearing but before entry of the May 8, 2006 judgment, the district court discovered that Father obtained an ex parte civil stalking injunction against Mother on the day before the hearing but had failed to inform Mother or the district court of that fact. Based on that information, the district court determined that it could not determine the advisability of enforcing the parties' stipulated joint legal and physical custody arrangement without receiving additional evidence regarding the children's best interests. Therefore, the district court ordered that the issue of child custody would proceed to trial. The district court adopted the parties' other agreements as stated on the record at the February 28, 2006 hearing. Additionally, the district court found that it would violate public policy to adopt an arbitration clause that would substitute an arbitrator for the district court to determine child custody. Accordingly, the district court ruled that any requirement to arbitrate would be limited to issues that did not pertain to the children. The district court entered a final judgment on May 8, 2008, after a trial on the remaining child custody issues. In that judgment, the district court granted sole legal custody of the children to Mother but granted joint physical custody to Mother and Father.

The focus of Father's brief on appeal is an alleged agreement within the settlement agreement to submit child custody issues to arbitration. Father claims that because such an agreement would be unenforceable, none of the other agreements reached by the parties can be enforced. The issue Father raises on appeal--that either all or none of the stipulations reached by the parties must be enforced--was not preserved in the district court. Father cites his trial brief, prepared in advance of the February 28, 2006 hearing, for preservation of the issue regarding selective or partial enforcement of the stipulated settlement. However, while the trial brief opposed the arbitration of child custody issues, it did not raise any issue regarding partial enforcement of the stipulated settlement. In addition, Father did not raise any issue regarding partial or selective enforcement of the agreement through a timely objection in the district court following the May 8, 2006 judgment. Because the issue raised on appeal was not first raised in the district court, it was not preserved for appeal. "[A]s a general rule, claims not raised before the trial court may not be raised on appeal." Tschaggeny v. Millbank Ins. Co., 2007 UT 37, ¶ 20, 163 P.3d 615.

Even assuming that the issue had been preserved, the district court was within its discretion to adopt some but not all, of the parties' agreements. "[A] stipulation pertaining to matters of divorce, custody and property rights therein, though advisory upon the court" will usually be adopted unless the trial

court determines that it is "unfair or unreasonable," but it is not binding on the court. Klein v. Klein, 544 P.2d 472, 476 (Utah 1975). "It is only a recommendation to be adhered to if the court believes it to be fair and reasonable." Id. Father's argument is simply that, as a matter of contract law, the agreement of the parties cannot be enforced except as a complete agreement. However, the parties may not remove an issue from the court hearing a divorce or custody matter by contract. See Diener v. Diener, 2004 UT App 314, ¶ 5, 98 P.3d 1178 (stating that a district court had authority to enter judgment for child support as appears reasonable and to modify such judgments "regardless of attempts by the parties to control the matter by contract"); see also Sill v. Sill, 2007 UT App 173, ¶ 9, 164 P.3d 415 (ruling that a non-modification provision of a settlement agreement did not divest the district court of statutory continuing jurisdiction to make orders based upon a material change of circumstances); id. ¶ 23 (Orme, J., concurring) (stating that "the parties cannot stipulate away a court's subject matter jurisdiction").

Accordingly, we affirm.

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Pamela T. Greenwood,
Presiding Judge

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Gregory K. Orme, Judge

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Carolyn B. McHugh, Judge